BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

Heidi Sprow,	)	Case No. **9901008758**
	)	
Charging Party,	)	
	)	
versus	)	*Final Agency Decision*
	)	
CEnTech Corporation,	)	
	)	
Respondent.	)	

I. Procedural Posture of the Case

In 1999, Hearing Examiner Terry Spear determined that respondent CEnTech Industries (CEnTech) had unlawfully discriminated in employment against Heidi Sprow by paying Sprow lower wages in full-time employment than her male counterparts. In an order dated January 24, 2003, the Human Rights Commission remanded this matter to the Hearings Bureau for "the limited purpose of providing Respondent CEnTech the opportunity to present legitimate non-discriminatory reason [sic] for paying its full-time women employees less than its full-time male employees."

Once returned to the Hearings Bureau, the matter was assigned to Hearing Examiner Terry Spear. On the basis of the commission's remand, the Hearings Bureau issued a "Notice Regarding Appointment of Hearing Examiner for Limited Purpose Hearing." The notice informed the parties of the limited nature of the inquiry, stating, "Implicit in the remand order is a requirement that the hearing examiner weigh the evidence from the first hearing (available only by reading the transcript or listening to the tapes) against live evidence Respondent CEnTech will now present, and any live evidence Sprow may present on rebuttal." The notice also informed the parties that either party could, if desired, request that the appointed hearing examiner be substituted.

In response to the notice, CEnTech requested substitution of the hearing examiner. CEnTech also objected to the notice, arguing that the commission's order "does not invite a comparison between evidence from the first hearing against live

evidence at a future hearing." Respondent's March 6, 2003 letter. In that letter, CEnTech maintained that no issue of full-time wage disparity existed in the first hearing and that CEnTech"could not at that time and cannot now present evidence in explanation of a legitimate non-discriminatory reason for paying full-time female employees less than its full-time male employees because no allegation in that regard has ever been made by either the charging party or the Department." *Id.*

The matter was reassigned to Hearing Examiner Gregory L. Hanchett and set for scheduling conference on March 24, 2003. At the time of the scheduling conference, CEnTech indicated that it wished to file a motion to dismiss based on its position that there was no issue regarding full-time wage disparity before the Human Rights Commission. The newly assigned hearing examiner provided an opportunity for both parties to brief the issue and deferred scheduling of the hearing until after CEnTech's motion could be ruled upon. See Order Setting Briefing Deadlines and Oral Argument, page 1.

After considering the parties' briefs and listening to oral argument, the hearing examiner denied CEnTech's motion to dismiss and set the matter for hearing on July 11, 2003. See Order Denying Motion to Dismiss and Order Setting Hearing. The parties were accorded an opportunity to complete additional discovery in preparation for the July 11, 2003 hearing date.

On July 8, 2003, counsel for CEnTech telephoned the Hearings Bureau, indicating that CEnTech would not be presenting any evidence at the hearing. After receiving the phone call, the hearing examiner scheduled a status conference with the parties on July 9, 2003 to ascertain the need for hearing in light of CEnTech's indication that it did not wish to present any evidence. At the status conference, CEnTech reiterated that it did not wish to present any evidence in light of its position that the issue regarding full-time wage disparity was not properly before the Human Rights Commission. When the hearing examiner reminded the parties that the hearing examiner would make a determination based on the transcript of the earlier proceeding if no additional evidence was to be introduced, CEnTech's counsel requested a brief continuance to speak to his client to decide if CEnTech needed to

present additional evidence.[1] The hearing examiner then continued the status conference at the behest of CEnTech until July 10, 2003.

At the time of the July 10, 2003 conference, counsel for CEnTech reiterated that CEnTech would present no evidence, but that CEnTech would be available for the hearing. As neither side wished to present additional evidence, the hearing examiner inquired as to whether the parties wished to brief the issue of the full-time wage disparity utilizing the transcript of the 1999 proceeding. Both sides declined to do so. Accordingly, the hearing examiner vacated the hearing and deemed the matter submitted on the transcript of the 1999 hearing and the exhibits admitted during the 1999 hearing. Having reviewed the 1999 hearing transcript and exhibits, the hearing examiner makes the following findings of fact, conclusions of law, and final agency decision.

II. Issue

Did CEnTech discriminate against Sprow in employment based on gender?

III. Findings of Fact

1. CEnTech made spa covers to fit particular spas. CEnTech relocated to Bozeman in August, 1998, and hired approximately 17 workers, including Sprow. CEnTech employed Sprow starting August 17, 1998 as a full-time employee. CEnTech paid her $7.50 an hour as a full-time employee.

2. Sprow had some experience as a lead worker. She expressed interest, at the time of hiring, in working up to a lead worker position.

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[1]At the July 9, 2003 conference, CEnTech's counsel reacted with some surprise that the hearing examiner would decide the remand utilizing the transcript and exhibits from the 1999 proceeding. For this reason, he requested an opportunity to consult with his client before deciding whether to present additional evidence. Counsel's surprise seemed somewhat disingenuous in light of the Hearing Bureau's clear statement in the March 6, 2003 order that the hearing examiner would "weigh the evidence from the first hearing (available only by reading the transcript or listening to the tapes) against live evidence . . . ." Nevertheless, the hearing officer, in order to ensure that CEnTech had an opportunity to present evidence as outlined in the Commission's January order, afforded CEnTech's counsel an opportunity to again contact his client (who was not present and could not be reached for the July 9, 2003 status conference)before deciding how to proceed. At the July 10, 2003 status conference, both CEnTech's counsel and Mr. Perry, president of CEnTech, declined to present evidence. In doing so, counsel and Mr. Perry reiterated their position that the issue of full-time wage disparity was not properly before the commission.

3. Sprow was a leading candidate for one of the lead worker positions, based upon her experience and initial performance. CEnTech intended to select lead workers after the first three months of operation.

4. In October 1998, before CEnTech selected lead workers, Sprow requested that CEnTech make her a part-time employee. She understood that converting to part-time would eliminate her from consideration for a lead position.

5. CEnTech did change Sprow's status to part-time, and reduced her wage to $6.00 per hour, effective October 26, 1998. Perry told her that as a part-time worker her wages would be $6.00 per hour, consistent with other part-time employees.

6. After she requested conversion to part-time status, Sprow discovered that another part-time employee, Kurt Gardner, was making $7.00 per hour, but another female part-time worker, Jenine Shay, was making $6.00 per hour. Sprow complained to her supervisor. Her supervisor told her that he had consulted with Perry, and that she would continue to make $6.00 an hour as a part-time worker.

7. Perry made individualized adjustments to the hourly wages of CEnTech's workers in Bozeman. He increased the hourly wage for workers he wanted to keep and promote. For example, he wanted Gardner, a college graduate, to increase his hours and become a full-time employee. He therefore paid Gardner more as a part-time worker than he paid either Sprow or Shay. Perry increased Randy Heinrich's wage from $7.50 per hour to $8.00 per hour when Heinrich became a sprayer. Heinrich then also received $8.00 per hour for work doing the same job as both Sprow and Anita Nelson. Anita Nelson continued to receive $7.50 per hour, even for hours spent working as a sprayer. Perry paid Jay Joyner, who had experience as a lead worker and later became a lead worker, $8.00 per hour for essentially the same full-time work for which Sprow, Nelson and Carol Shores received $7.50 per hour as full-time workers. Shores, like Sprow and Joyner, had previous experience as a lead worker.

8. Workers who received higher wages for essentially the same labor were all male—Gardner, Joyner and Heinrich—while their counterparts receiving lower wages were often female—Shay, Nelson and Shores.

9. Due to a temporary decrease in work, CEnTech laid off Sprow on December 18, 1998.

10. Sprow worked a total of 304.25 hours at $7.50 per hour, from her hiring through October 25, 1998. For each of those hours, she received $.50 less than

comparable male employees, for a total of $152.13. Interest on the unpaid wages through March 2, 2000, amounts to $21.38. [2]

11. Sprow did not suffer emotional distress because she received a lower full-time wage than comparable males.

IV. Opinion

Montana law prohibits discrimination in employment because of sex. Mont. Code. Ann. §49-2-303(1)(a). Sprow must initially demonstrate that CEnTech took adverse employment action against her because she was a woman. If this burden is met, then CEnTech must show that it had a legitimate non-discriminatory reason for its action. If CEnTech demonstrates a legitimate basis for the full-time wage disparity, the burden will then shift back to Sprow to show that the proffered reasons were mere pretext. As explained below, Sprow demonstrated her prima facie case of discrimination but CEnTech failed to offer any legitimate basis for the full-time wage disparity.

Sprow Established a Prima Facie Case of Discrimination

Where there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof articulated in *McDonnell Douglas.*[3] ***See, e.g.***, *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988); J*ohnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984). Sprow did not present direct evidence of discriminatory motive.

The first tier of *McDonnell Douglas* requires Sprow to prove her prima facie case by establishing four elements:

> (i) that [s]he belongs to a [protected class] . . .; (ii) that [s]he applied and was qualified for a job for which the employer was seeking applicants; (iii) that,

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[2] Interest on each paycheck, from issuance until the date of the last payday at $7.50 per hour, is $0.96. Interest on the entire award, from October 29, 1998 (Sprow's last payday at $7.50 per hour) through March 2, 1999, is $5.21. The interest on the entire award from March 3, 1999, through March 2, 2000, is $15.21. Adding these numbers generates the interest award.

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

> despite [her] qualifications, [s]he was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
> *McDonnell Douglas*, ***supra***, 411 U.S. at 802, 93 S.Ct. at 1924.

The Court noted in *McDonnell Douglas* that this standard of proof is flexible. The four elements may not necessarily apply to every disparate treatment claim. Thus, Sprow needed to prove that she was as qualified to earn wages as the men earning higher wages, and that despite her equal qualifications, the employer paid her a lower wage than those men.[4]

Sprow was a full-time worker with prospects to become a lead worker until October 26, 1999. Sprow proved that for a full-time employee and potential lead worker, her lack of a college degree did not render her less qualified than Gardner.[5] Thus, Sprow established that for the full-work she was doing, she was as qualified as the other workers were. The relevant difference between Sprow and Gardner was gender. Sprow also proved other instances of similar conduct by CEnTech. The relevant difference between Heinrich and Nelson, and between Joyner and Shores, was also gender. CEnTech, during the brief time Sprow worked there, paid three males more for comparable work than it did several females. Sprow carried her burden of proving her prima facie case with respect to the full-time wage disparity.

CEnTech Did Not Prove A Legitimate Business Reason for The Full-time Wage Disparity

Sprow's prima facie case under *McDonnell Douglas* raised an inference of discrimination with respect to the full-time wage disparity issue. The burden then shifted to CEnTech to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Crockett*, ***supra***, 761 P.2d at 817. CEnTech had to satisfy this second tier of proof under *McDonnell Douglas* for two reasons:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

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[4] ***Cf.***, *Martinez v. Yellowstone County Welfare Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981) ***citing*** *Crawford v. West. Elec. Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980) (fitting the four elements of the first tier of *McDonnell Douglas* to the allegations and proof of the particular case).

[5] Nothing in the transcript or exhibits suggests that a college degree made a part-time worker more valuable to the employer.

Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207, 217 (1981). CEnTech had the burden to raise a genuine defense by clearly and specifically articulating its legitimate reason for taking the adverse action against Sprow. ***See***, *Johnson*, *supra*, 734 P.2d at 212.

CEnTech failed to satisfy its burden in the second tier of *McDonnell Douglas*, with respect to the full-time wage disparity between the men and women employed by CEnTech. Sprow proved her *prima facie* case regarding her full-time wages. She proved disparate treatment of male versus female prospects for higher paying jobs (Heinrich, Joyner and Gardner versus Nelson, Shores and Sprow). CEnTech's legitimate business reasons (articulated in the 1999 hearing) for disparity in part-time pay did not demonstrate a legitimate reason for the full-time wage disparity. The reasons proffered during the 1999 hearing do not explain why CEnTech rewarded males considered good prospects with more money per hour, while females with identical work skills, habits and work quality were given less money per hour. And, though given the opportunity to do so, CEnTech refused to put on any additional evidence to demonstrate a legitimate business reason for the full-time wage disparity. Utilizing the *McDonnell Douglas* analysis, the hearing examiner must conclude that CEnTech made adverse employment decisions about Sprow's full-time pay based upon her gender.

Sprow Is Entitled to Recover Her Lost Wages

Upon a finding of illegal discrimination, the Montana Human Rights Act mandates an order requiring any reasonable measure to rectify any resulting harm to the complainant. Mont. Code Ann. §49-2-506(1)(b). Sprow lost fifty cents per hour while a full-time worker. She is entitled to recover that amount. Pre-judgment interest is properly part of that award to compensate for lost wages. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Foss v. J.B. Junk*, Case No. SE84-2345 (Montana Human Rights Commission, 1987).

Affirmative Relief Is Proper

The finding of a discriminatory motive requires affirmative relief in order to prevent future discriminatory acts by CEnTech. Mont. Code Ann. §49-2-506(1)(a).

V. Conclusions of Law

1. The Department has jurisdiction over this case. Mont. Code Ann. §49-2-509(7).

2. Respondent CEnTech Corporation, through its CEO, Gary Perry, unlawfully discriminated in employment against charging party Heidi Sprow because of her sex (female) when it paid her lower wages than it paid comparable male employees until she became a part-time employee effective October 26, 1998. Mont. Code Ann.§49-2-303(1)(a).

3. Pursuant to Mont. Code Ann. §49-2-506(1)(b), CEnTech must pay to Sprow the sum of $152.13 in unpaid wages and $21.38 in pre-judgment interest on those unpaid wages resulting from the illegal discrimination.

4. The circumstances of the illegal discrimination mandate imposition of particularized affirmative relief, to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. §49-2-506(1).

5. For purposes of Mont. Code Ann. §49-2-505(7), Sprow is the prevailing party.

VI. Order

1. Judgment is found in favor of Heidi Sprow and against CEnTech Corporation on the charge that CEnTech illegally discriminated against Sprow in employment because of her sex (female).

2. Within 90 days of this order, Gary Perry must attend four hours of training, conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the subject of sexual equality in pay and terms and conditions of employment. Upon completion of the training, Perry shall obtain the signed statement of the trainer indicating the content of the training, the date it occurred and that he attended for the entire period. Perry must submit the statements of the trainer to the Commission staff within two weeks after the training is completed.

3. CEnTech Corporation, or any successor company owned and operated by Gary and Lisa Perry, is enjoined from taking any adverse employment action against any employee because of sex (female). Said entity is also required, within 30 days of this order, to submit to the department (Human Rights Bureau, ATTN: Ken Coman, P.O. Box 1728, Helena MT 59624-1728) a complete list of its employees by name, address, SSN, date of hire, sex, job title and rate of pay. Said entity is also required to answer any subsequent inquiry of the department regarding employees, and to follow any direction of the department regarding the adjustment of employee pay found by the department to be based upon sex. The department's jurisdiction over

said entity extends for one calendar year beyond the date of final decision (whether this order or subsequent order on appeal from this order) of this case.

4. CEnTech Corporation must pay Heidi Sprow $173.51 ($152.13 in unpaid wages and $21.38 in pre-judgment interest on those unpaid wages). Judgment interest accrues as a matter of law.

Dated: August 5, 2003

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Examiner
Montana Department of Labor and Industry